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SEDIMENTS CLEANUP LIABILITY

PORTLAND HARBOR SITE DECISION

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The Port of Portland and Union Pacific Railroad recently fought the opening judicial battle in the war over liability for contaminated sediments within the Portland Harbor Superfund site. On March 26, 2001, following a court trial, Judge Owen Panner issued the first judicial opinion allocating responsibility for past remedial action costs relating to the contaminated sediments in a portion of the Willamette River (Slip 3, Terminal 4) within the boundaries of Oregon's largest ever Superfund Site. *Port of Portland v. Union Pacific Railroad Co.*, United States District Court for the District of Oregon, Case No. CV98-886-PA. The court found that: 1) the Port of Portland was responsible for 90% of past remedial action costs relating to Slip 3; and 2) it would be impermissibly speculative to issue a declaratory judgment determining the parties' responsibilities for future remedial action costs in Slip 3.

Beginning early in the 20th century, Union Pacific operated a pipeline beneath what is now Port property to deliver locomotive fuel from berths adjacent to the terminal to the railroad's "tank farm" and up gradient from the terminal and slip. Until 1955, this fuel was "Bunker C," a thick, heavy petroleum product having the consistency of asphalt at room temperature that historically was used to power the railroad's steam locomotives. From about 1955 until the pipeline was decommissioned in 1971, the pipeline carried diesel fuel. It was undisputed that diesel leaked from the pipeline in 1970 and 1971.

In 1998, the Port of Portland filed a contribution claim under ORS 465.257, seeking to hold Union Pacific Railroad responsible for 80% of the costs to cleanup "diesel contamination" at Slip 3, Terminal 4. Originally, the Port claimed that the ground beneath its terminal facility and the sediments in the adjacent slip were contaminated with diesel fuel released from the railroad's pipeline from 1970 and 1972 until the pipeline was decommissioned. The Port also claimed that fuel released from the tank farm, primarily during locomotive refueling, had migrated downhill beneath Terminal 4. Prior to trial, the parties had settled a separate claim by the Port dealing with fuel releases from the railroad's "tank farm."

Over the course of discovery and pretrial maneuvering, it became clear that the sediments in Slip 3 were contaminated with heavy metals and "pencil pitch," a product of coal tar pitch transported as friable solid rods. Pencil pitch is a solid product of coal tar pitch used in the smelting of heavy metals and aluminum. A tenant of the Port had unloaded pencil pitch from the Slip 3 site over a substantial period of time, and several documented spills occurred. (In fact, the

slip was subject to an earlier federal clean up order. Dredge spoils from earlier clean ups at Slip 3 were among the materials disposed of at Ross Island.) These pencil pitch contaminants were not linked to the railroad's pipeline but rather to operations of the Port or its tenants.

In light of this other contaminant evidence, the Port refined its liability claim against Union Pacific to content that regardless of these other contaminants, all remediation at the site would be driven by the presence of hydrocarbons in the sediments. In line with this new theory, the Port alleged that the primary source of hydrocarbon contamination in the sediments was not diesel but the Bunker C, also released from the railroad's pipeline. According to the Port, this heavy Bunker C fuel "leaked" out of the pipeline sometime prior to 1955, and remained in place in the ground. (At "room temperature," Bunker C has the consistency of asphalt.) At some later point, so went the Port's theory, the Bunker C in the ground was liquefied and mobilized by diesel fuel leaking out of the same pipeline while it was used for the transport of diesel fuel between 1955 and 1971. This mobilized mixture of the heavy Bunker C and diesel fuel migrated into Slip 3, the Port claimed. In the water, the diesel fuel dissipated, and the heavier Bunker C component sank to the bottom and lodged in the sediments.

Union Pacific challenged the origin and transport of the hydrocarbons in the sediments in Slip 3, contending that the Port and its tenants contaminated the sediments over many years with pencil pitch and heavy metals.

Judge Panner's ruling focused on the equitable analysis mandated by ORS 465.257, and applied the 11 equitable factors set forth in ORS 465.257(1). The court paid particular attention to the actual statutorily defined hazardous substances found in both Bunker C and pencil pitch. These were the polynuclear aromatic hydrocarbons ("PAHs") designated by the EPA as hazardous substances. The PAH's traceable to pencil pitch were more toxic and outweighed those traceable to Bunker C by a factor of 40. Based upon the much larger proportion of PAH's (measured in parts per million) in pencil pitch, the court held that application of the statutory equitable factors required the Port to bear 90% of the responsibility for the past remedial investigation costs. In the court's view, the Port was the party responsible for the spillage of greater volume of the more highly toxic pencil pitch into Slip 3.

The Port also sought a declaratory judgment to establish the percentage that each party should bear of future remedial action costs relating to the cleanup of the sediments in Slip 3. The court denied the Port's claim, finding that the lack of agency clean up standards or rulings precluded the court from determining with any certainty which contaminants, if any, the Port would be required to remediate. Therefore, the court could not determine by a preponderance of the evidence which of the many substances allegedly contaminating the Slip 3 sediments would be targeted for removal. Under these circumstances, the court held that a declaratory judgment determining the parties' responsibilities would be speculative.

This allocation case is important in part because the court held that an allocation of responsibility based solely on the volume of contaminants contributed by each party is not appropriate when different parties have contributed different contaminants to a site. In this case, the court found that the total volume of Bunker C compared to the total volume of pencil pitch found in the sediments that was not determinative. The court recognized that volume of

contaminants was only one part of the equation. The court also had to take into account that the hazardous substances in both pencil pitch and Bunker C, as defined by 40 CFR § 302.4(a), were found in much greater concentrations in pencil pitch than in Bunker C. The court distinguished the case of *Boeing Co. v. Cascade Corp.*, 207 F3d 1177 (9th Cir 2000), in which the Ninth Circuit approved an allocation analysis based solely on the volume of contaminants contributed by each party. There, both parties were responsible for contaminants containing the same type and amount of hazardous substances.

Although *Port of Portland v. Union Pacific Railroad Co.* is an early decision in what is sure to be a protracted superfund process, it carries important lessons for future allocation battles between Portland Harbor potentially responsible parties.

One of the key lessons from Judge Panner's ruling is that courts will not be willing to decide allocation disputes over future remedial action costs until after the EPA establishes sediment clean up guidelines for the Portland Harbor site, an event that is probably several years down the road.

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